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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/597,463

09/06/2006

Sabrina Higgins

102792-606 (11381P1 US)

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EXAMINER

MCKANE, ELIZABETH L

ART UNIT

PAPER NUMBER

1797

MAIL DATE

DELIVERY MODE

07/10/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	<p>Application No. 10/597,463</p>	<p>Applicant(s) HIGGINS ET AL.</p>	
	<p>Examiner ELIZABETH L. MCKANE</p>	<p>Art Unit 1797</p>	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 29 June 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Elizabeth L McKane/
Primary Examiner, Art Unit 1797

Continuation of 11. does NOT place the application in condition for allowance because: On pages 3-4 of the Response, Applicant argues that McKechnie does not teach or suggest increasing the concentration of terpene to an amount greater than 5%. While the Examiner recognizes this fact, it is also noted that McKechnie is not an anticipatory reference and thus, is not required to teach such. Moreover, although Applicant alleges that 'superior results' are achieved using a concentration of 8% terpene, Applicant has provided no experimental results comparing a 5% emulsion to an 8% emulsion. Thus, it cannot be ascertained if the improved results are 'unexpected' or merely additive. On pages 4-5 of the Response, Applicant attacks Blanc by noting that Blanc, too fails to teach or suggest an oil-in-water emulsion having a deactivant amount greater than 5% by weight. Again, as Blanc was not used in an anticipatory rejection, Blanc is not required to teach such. Nevertheless, the Examiner maintains that Blanc provides motivation to one of ordinary skill in the art to increase the amount of deactivant above 5% in McKechnie as being safe and effective in deactivating dust mite allergens. As to Applicants assertions that concentration is not a result effective variable, the Examiner notes that normally, it is to be expected that a change in temperature, or in concentration, or in both, would be an unpatentable modification, unless Applicant can provide evidence indicating such concentration or temperature is critical, producing results which are different in kind and not merely in degree from the results of the prior art. See *In re Aller*, 105 USPQ 233 (CCPA 1955). In this case, Applicant has failed to show any criticality or unexpected results in using a concentration of 8% over 5% in an emulsion.

On pages 10-11, Applicant argues the combination of Miller with Franklin noting again that neither teach or suggest using the deactivant in an amount of 8% in an emulsion. However, as Franklin teaches the known use of oil-in-water emulsions of terpene deactivants and as Miller discloses the use of amounts up to 11.49% of an essential oil in a solution, the Examiner maintains that using an emulsion as the solution of Miller would have been obvious. Applicant has failed to provide evidence to the contrary.